MALAYSIAN REPORTS

MUIP BIN TABIB v. DATO JAMES WONG; WAN HAMID BIN TUANKU SURUR v. FRANCIS LOKE

[O.C.J. (B.T.H. Lee J.) January 8, 1971]

[Kuching — Election Petitions Nos. K1 and K2 of 1970]

Elections — Petition — Petition not stating grounds relied on — Onus on petitioners to prove non-compliance with provisions of written law and that such non-compliance affected result of election — Rejection of nomination papers by returning officer — Election Offences Act, 1954, s. 32.

In this case the returning officer had rejected the nominations of the petitioners on the grounds that the nomination papers did not state how the persons wished to be described. The petitioners had earlier asked for the return of their nomination papers for amendment but the returning officer had refused to return them. The petitions alleged that (1) the returning officer was wrong in rejecting the nomination papers and (2) the returning officer was wrong in refusing to allow the petitioners to amend their nomination papers. The respondents sought to have the petitions struck out or dismissed on a number of grounds, *viz* (a) that the petitions did not satisfy the requirements of section 32 of the Election Offences Act, 1954, (b) the notices of presentation of the petitions were not served by the petitioners on the respondents as required under rule 19 of the Election Petition Rules, 1954, (c) that the dates of the elections were incorrectly given in the petitions.

Held, dismissing the petitions: (1) the petitions were defective as neither of them alleged non-compliance with the provisions of any written law relating to the election nor was there any allegation that the result of the election had been affected;

(2) the petitions were also defective in stating incorrectly the dates of the elections;

(3) on the merits of the case the court was satisfied that the returning officer had proceeded with the utmost good faith and impartiality and that he was right in rejecting the nomination papers;

(4) both on the preliminary objection and on merit the petitions must be dismissed.

Cases referred to:-

(1) *Ram Abhilakh Tewari* v. *Election Tribunal, Gonda & Ors.* A.I.R. 1958 All. 663; 14 E.L.R. 375.

(2) *J. Devaiah* v. *Nagappa* A.I.R. 1965 Mysore 102 at p. 106.

(3) *Savithri Devi* v. *Prabhawathi Misra* 15 E.L.R. 358 (All).

(4) *Harish Chandra Bajpai* v. *Triloki Singh* A.I.R. 1957 S.C. 370.

(5) *Batala Sikh Rural Constituency (Case No. 2)* I.E.C. (1935-50) vol. II p. 263.

(6) *Bhandara District Case* Doabia's Election Cases (1864-1935) vol. I p. 218, 221.

(7) *Multan Division Towns (Mohammadan) Constituency (Case No. 2)* I.E.C. (1935-50) vol. II p. 302.

(8) *Hari Das* v. *Hira Singh Pal* 4 E.L.R. 466.

(9) *Hansraj* v. *Ram Singh* 2 E.L.R. 12.

(10) *Re Election Petition of Cheah Seng Teik* [1958] M.L.J. 275 at p. 277.

(11) *Leonard* v. *Nachiappa Chetty* (1923), 4 F.M.S.L.R. 265 at p. 269.

(12) *Public Prosecutor* v. *Anthony Wee Boon Chye & Anor.* [1965] 1 M.L.J. 189, F.C.

(13) *Gothard* v. *Clarke* (1880) 5 C.P.D. 253 at p. 265.

(14) *Joseph Theberge & Anor.* v. *Philippe Landry* (1876) 2 App. Cas. 102 at p. 106.

(15) *Arzu* v. *Arthurs* [1965] 1 W.L.R. 675.

(16) *Mather* v. *Brown* (1876) 1 C.P.D. 596 at p. 601-602.

(17) *Maude* v. *Lowley* (1874) L.R. 9 C.P. 165.

(18) *Reg.* v. *Tugwell* (1868) L.R. 3 Q.B. 704.

(19) *Reg.* v. *Munday* [1868] V.L.R. 143.

(20) *Bodh Raj* v. *L. Shiv Dayal* I.E.C. (1935-50) vol. I p. 245.

(21) *Southern Towns Mohammedan Constituency* I.E.C. (1935-50) vol. I. p. 295.

(22) *Sitapur District East, Babu Jagan Nath Prasad* v. *Raja Maheshwar Dayal Seth* I.E.C. (1935-50) vol. II pp. 217 *et. seq.*

(23) *Harmon* v. *Park* 7 Q.B.D. 369.

(24) *Harmon* v. *Park* 6 Q.B.D. 232.

ELECTION PETITIONS.

P. Mooney (*S. Sahatevan* with him) for the petitioners.

T. O. Thomas for the respondents.

D. Ong for the returning officer.

Cur. Adv. Vult.

B.T.H. Lee J.: This is an election petition presented by Muip bin Tabib, petitioner No. 1, who was a candidate, duly nominated to contest the election for the constituency of P. 142 Miri/Subis, and by Wan Hamid bin Tuanku Surur, petitioner No. 2, a candidate duly nominated to contest the election for the constituency of S. 43 Subis.

Pursuant to rule 6 of the Election Petition Rules, 1954, these petitions were dealt with together, the issues raised in the petitions being substantially identical.

By paragraph 2 of the election petition it was stated that the election was holden on the 5th day of April, 1970, in the first petition and that the election was holden on the 5th day of April, 1969, in respect of the second petition.

The basis of the petitions as set out in paragraph 3 of the petitions is that nomination papers were filed on 5th April, 1969, at or about 10 a.m. At or about 10.30 a.m. the petitioners wished to withdraw their papers because they were led to believe that their papers might not have been correctly completed in a minor respect and they wished to make a minor correction. The returning officer refused to allow the petitioners to have their papers back and subsequently after the closing of the period allowed for nominations rejected the nominations upon objections to the said papers.

The objections were that petitioner No. 1 had entered a dash in the Form opposite the words "I wish to be described on the ballot paper as....." and petitioner No. 2 had entered a "Nil" in the Form opposite those words.

The petitions added that —

(i) the returning officer was wrong in rejecting the nomination paper;

(ii) the returning officer was wrong in refusing to allow the petitioners to amend their nomination paper;

and the election is void under section 32.

The petitioners conclude their petitions with a prayer that it may be determined that Dato James

Wong Kim Min, respondent No. 1, and Francis Loke, respondent No. 2, were not duly elected or returned and that the election was void.

By their notices of motion (as amended) the respondents seek to have the petitions struck out or dismissed on a number of grounds —

First, that the petitions did not satisfy the requirements of section 32 of the Election Offences Ordinance, 1954.

Secondly, that the notices of presentation of the petitions were not served by the petitioners on the respondents as required under rule 15 of the said Election Petition Rules, 1954.

Thirdly, that the elections in which the respondents were returned elected for the constituency of P.142 Miri/Subis and the constituency of S.43 Subis were holden neither on the 5th day of April, 1970, nor on the 5th day of April, 1969.

It is to be pointed out at the very outset that the court decided to hear evidence which may be adduced at the trial or hearing on merits without which the court finds some difficulty in determining the preliminary issue.

The court also indicated that it will consider the evidence adduced without prejudice to the ruling on the preliminary objections.

I will now proceed to consider both the preliminary issue and the merits.

I will deal with the first of these grounds.

There is a good deal of authority which has been relied on by counsel for the respondents in which the courts in India have laid down guidelines as to how the matter should be treated, such as the present and I think I must allude briefly to some of these cases. But before I do so, it may be convenient to set out the provisions of the election law insofar as they are relevant on this point.

I will begin with the provisions of our own election law.

Section 32 of the Election Offences Ordinance, 1954 (hereinafter called "the Ordinance") specifies five grounds on or under which an election may be declared to be void on an election petition.

Section 32(a), (c), (d) and (e) deal with corrupt practices, bribery, treating etc. and are wholly irrelevant.

The only remaining sub-section available to the petitioners for the purposes of the petitions appears to be section 32(b), and is in my opinion of great consequence in this case.

"32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely —

(a) ....

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) ....

(d) ....

(e) ....".

Rule 4 of the Election Petition Rules. 1954 (hereinafter called "the Petition Rules"), so far as relevant, states —

"4. (1) An election petition shall contain the following statements —

(a) ....

(b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

(2) ....

(3) ....

(4) ....".

Paragraph 3 of each of the petitions alleged that —

"And your petitioner says that —

(i) the Returning Officer was wrong in rejecting the nomination papers;

(ii) the Returning Officer was wrong in refusing to allow your Petitioner to amend his nomination papers;

and the election is void under section 32."

Nowhere in the petitions is it said that the petitions have been presented on the ground set out in paragraph (b) of section 32.

In my view paragraph 2 of the petitions does not constitute grounds within paragraph (b) of section 32.

To show that the returning officer was guilty of "non-compliance with the provisions of *any written law* relating to any election ...", it is I think necessary for the petitioners to refer to the specific written law. In neither of the petitions has any reference been made to such written law.

According to the Indian authorities they establish that a petition under section 100(1)(d)(iv) of the Representation of the People Act, 1951 (which is substantially the same as our section 32(b)) there must be a clear allegation that the result of the election has been materially affected and in the absence of such an allegation the court has no jurisdiction to enquire into the allegations made.

The first case is *Ram Abhilakh Tewari* v *The Election Tribunal, Gonda and others.*[1] The court held at page 666 as follows: —

"Consequently, whenever a petition is based on the provisions of s. 100(1)(d)(iv) of the Representation of the People Act there must be a clear allegation in the first instance that the result of the election has been materially affected and then in addition the petition should show that it has been materially affected by non-compliance with the provisions of the Representation of the People Act or the rules framed thereunder."

The next case is *J. Devaiah* v. *Nagappa*[2] where the Court of Appeal held as follows: —

"Similar view was taken by the Allahabad High Court in *Ram Abhilakh Tewari* v. *Election Tribunal, Gonda* 14 Ele LR 375; (A.I.R. 1958 All. 663). This decision highlights the importance of pleadings in Election Petitions. Therein it was laid down that in a petition under Section 100(1)(d)(iv) of the "Act" there must be a clear allegation that the result of the election has been materially affected and in the absence of such an allegation the court has no jurisdiction to enquire into the allegations made.

The same view was reiterated by the Allahabad High Court in *Savithri Devi* v. *Prabhawathi Misra.*[3]

No decision taking a contrary view was read to us."

Also to be noted is *Harish Chandra Bajpai* v. *Triloki Singh*[4] (an unanimous decision of the Supreme Court of India) which was followed in the above two Indian cases.

It was urged by counsel for petitioners that they deal with corrupt practices quite different from rejection cases. That does not appear to me to make any difference in point of principle.

Counsel for petitioners has quoted from *Srivastava* at page 297, second paragraph, as follows: —

"A distinction has now been made between rejection of a nomination and improper acceptance of a nomination. In the case of the former it is a sufficient ground in itself to invalidate the election while in the case of the latter it should in addition be shown that the improper acceptance has materially affected the result of the election so far as it concerns the returned candidate ... In the former case the whole electorate is deprived of its right to vote for a candidate who was legally entitled to stand, whereas in the latter case all the candidates including the disqualified one, are put up for election and everyone on the electoral roll has had an opportunity of voting for the candidate he prefers. Therefore in the case of improper rejection the court may presume that the result of the election has been materially affected and may avoid the election. But in the latter case the petitioner must prove by affirmative evidence that the result has been materially affected."

Various cases are cited to this effect. I have considered them, *e.g.*

Batala Sikh Rural Constituency (Case No. 2);[5]

Bhandara District Case;[6]

Multan Division Towns (Mohammadan) Constituency (Case No. 2);[7]

Hari Das v. *Hira Singh Pal*;[8]

Hansraj v. *Ram Singh*;[9]

but in my view these cases are distinguishable from the present case as the decisions were based upon the express provisions of section 100(1)(c) of the Indian Representation of the People Act, 1951, which find no counterpart in our law, and have no application in this country.

The provisions of section 100 of the Indian Act so far as relevant are as follows: —

"100. Grounds for declaring election to be void. — (1) Subject to the provisions of sub-section (2) if (the High Court) is of opinion —

(a) ....

(b) ....

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected —

(i) by the improper acceptance of any nomination, or

(ii) ....

(iii) ....

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

(the High Court) shall declare the election of the returned candidate to be void."

We have no quarrel with the decisions of courts in India which lay down that in cases of improper rejection of any nomination paper it is not necessary to prove as a fact that the result of the election has been materially affected.

It seems clear that in the cases of improper rejection there is no need to allege that the result has been materially affected, unlike non-compliance with the provisions where it must be proved that the result of the election has been materially affected.

The provisions of our section 32(b) are quite clear.

The onus is on the petitioners to prove to the satisfaction of the election judge the following —

(a) non-compliance with the provisions of any written law relating to election; and

(b) that such non-compliance affected the result of the election.

I would quote the case of *Ram Abhilakh Tewari* v. *The Election Tribunal, Gonda and Ors.*,[1] in respect of section 100(1)(d)(iv) which is substantially identical with the provisions of our section 32(b). The court said at page 666 —

"The ground itself is that the result has been materially affected and then there is the qualification that it should have been affected by non-compliance with the provisions of the Act or the rules framed thereunder. The principal ingredient of the ground is that the result has been materially affected and not that there had been non-compliance with the provisions of the Act or the rules."

This view of the matter is further supported by a local case in Penang *Re Election Petition of Cheah Seng Teik*[10] where Rigby J. (as he then was) stated —

"It is to be noted that mere non-compliance with the provisions of such written law is not, by itself, sufficient to avoid the election; the non-compliance must have affected the result of the election."

On the question of jurisdiction I would refer to *J. Devaiah* v. *Nagappa* at p. 106: —[2]

"Therein it was laid down that a petition under section 100(1)(d)(iv) of the 'Act' there must be a clear allegation that the result of the election has been materially affected and in the absence of such an allegation the court has no jurisdiction to enquire into the allegation made."

It would therefore appear that neither of these petitions alleges non-compliance with the provisions of any written law relating to the election. Nor was there any allegation that the result of the election has been affected.

Now a word as to Indian authorities.

As was pointed out by the court in *Leonard* v. *Nachiappa Chetty*[11] at p. 269 —

"Decisions of Indian Courts are of course not binding here but they are very valuable guides and have always been treated with the greatest respect by the courts in this country. Putting the matter at its lowest it can at least be said that due weight should be given to them when it is found that they are based on reasoning that commends itself to the court."

To this may be added the recent Federal Court case of *Public Prosecutor* v. *Anthony Wee Boon Chye and Anor.*[12] where Thomson L.P. stated at page 194—

"Before departing from the case something should be said of the Indian case of..., for, although not binding on us, any judgment of the Supreme Court of India must always be regarded as of very great persuasive value."

To my mind the above cases are fully in point and I have no hesitation in following them in the construction of our section 32.

I will now turn to ground No. 3.

It is a requirement under rule 4(1)(b) of the Petition Rules that the petition shall state the holding of the election.

The form of petition is set out under rule 4(4) of the same Rules and paragraph (2) is as follows: —

"And your petitioners state that the election was holden on the... day of... 19..., when A.B., C.D., and E.F. were candidates, and the Returning Officer has returned A.B. as being duly elected."

In the case of the first petition paragraph 2 states as follows: —

"And your Petitioner states that the election was holden on the 5th day of April, 1970....".

In the second petition the wording is the same as in the first petition except that the figures "1970" have been deleted and the figures "1969" substituted therefor.

The headings in both petitions and all papers submitted with the petitions recited that the election was holden on the 5th day of April, 1969.

By their affidavits, the respondents deposed to the fact that the elections in which the respondents were declared elected were holden neither on the 5th day of April, 1970, nor on the 5th day of April, 1969.

The court is not here dealing with a case where the date is omitted, by mistake or otherwise.

It was held in *Gothard* v. *Clarke*[13] that the insertion of a wrong number on the burgess roll would be more misleading than the insertion of no number. It is here to be observed that no one had been or could be misled by the mistake (the number was wrongly stated as 704 instead of the right number 695).

Also in the Privy Council case of *Joseph Theberge and Another* v. *Philippe Laudry*[14] Lord Cairns said in respect of the Quebec Elections Acts as follows: —

"These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

On the question of "peculiar jurisdiction", reference may be made to the judgment of the Privy Council in the case of *Arzu* v. *Arthurs*[15] an election matter.

Lord Pearce in his judgment said at page 679: —

"If the decision in this peculiar jurisdiction is to be final such finality must apply irrespective of the reasons for the decision. The fact that no evidence has been heard does not affect the general principle. The court in the present case did not refuse jurisdiction; it decided in its peculiar jurisdiction that the petitions were defective".

Other authorities which were cited by counsel for respondents are *Mather* v. *Brown*,[16] *Maude* v. *Lowley*[17] and *Regina* v. *Tugwell*.[18]

To my mind to accept a different date from the one stated in the petitions is a device to obtain what the petitioners could not obtain by amendment, which clearly the court has no jurisdiction to do so under the election laws.

In other words, it would be tantamount to achieving by indirect means what could not possibly be attained directly.

Further, there is nothing here to show that the petitioners might not with reasonable diligence have ascertained the date of election from the relevant *gazettes*.

The court, having thus arrived at the conclusion that the date was wrong (which fact was admitted by counsel for the petitioners), it is not open to the petitioners to say that the date is identifiable.

But whether it is identifiable after the court has gone into the merits is a different proposition. The court does not deal with the case upon merits when it is solely concerned at that stage with the preliminary objection.

I come now to the second ground, namely, that the notices of presentation of the petitions were not served by the petitioners on the respondents as required under rule 15 of the petition rules.

Rule 15 provides as follows: —

"Notice of the presentation of a petition, accompanied by a copy thereof, *shall*, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service *may* be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under Rule 10 of these Rules or by posting....".

It was contended by counsel for the respondents that rule 15 has not been complied with.

To my mind rule 15 is not mandatory as to the mode of service. The word "shall" appears in the first sentence of the rule, which indicates that the rule is mandatory, but I am of opinion that where the rule is directory as to the mode of service, substantial compliance is sufficient.

There is no objection that the respondents were not served, neither was there any objection that the service was out of time.

For myself despite the very strong submission by counsel for the respondents I have to decide that it was good service.

I will now proceed to deal with the second issue on merits.

Turning to the facts of the case, after the returning officer had declared the nominations closed ob-

jections to nominations were received. Jackie Yong and Sim Boon Chew objected to Wan Hamid bin Tuanku Surur, petitioner No. 2, on the ground that he had failed to show how he wanted to be described on a ballot paper. Petitioner No. 2 merely put down the word "Nil".

Jackie Yong also objected to Tua Kampong Muip bin Tabib, petitioner No. 1, on the ground that petitioner No. 1 had failed to indicate on the nomination paper how he wished to be described on a ballot paper. He merely put down a dash "—".

The objections and decisions were recorded by the returning officer in writing (Exhibit C.6) (Appendix "A").

For ease of convenience, the relevant portions of Appendix "A" are set out as follows: —

"2.(b) The nomination paper of Wan Hamid bin Tuanku Surur, a candidate for S.43 Subis, failed to show how he wanted to be described on the ballot paper. He merely put down the word "Nil". Mr. Jackie Yong ably argued that such omission was serious as it would mean that he did not wish his name to be printed on the ballot paper. He pointed out that this would confuse the voters since only the political symbol of the Alliance would appear. They would not know for whom they were voting.

(c) Mr. Jackie Yong also raised objection against the nomination paper of T.K. Muip bin Tabib. The grounds of his objection were similar to those of Wan Hamid referred to in para. 2(a) above. T.K. Muip failed to complete the Section of Form 3 which required him to indicate how he wished to be described on the ballot paper. Failure to do so, according to Jackie Yong, was a non-compliance of the requirements of the law.

Decisions:

(b) *Wan Hamid bin Tuanku Surur:*

He was given an opportunity to reply to the objection raised against his nomination paper. At the outset he had no hesitation in saying that he did not mind if his name was not printed on the ballot paper as he was satisfied with the authority to use the party symbol of a sailing boat. He said that people would still vote for him guided by the party symbol. When I drew his attention to the requirement of the law that the name of each candidate shall be printed on the ballot paper in the order which they have determined by lot and in a style to be described by the candidate on their nomination paper in accordance with Regulation 17(2) of the Elections (Conduct of Elections) (Sabah and Sarawak) Regulations, 1968, he replied he was ill-advised by the S.A.O. Sibuti. The latter flatly denied that he had given any advice contrary to the requirements of the law. If he had done so, the nomination paper of Inche Hashim bin Haji Ladis, a candidate for Sibuti, the same place from which Wan Hamid came, would also be disqualified. Inche Hashim had sought the advice of the S.A.O. and his paper was found in order. I could not accept the allegation against an S.A.O. of being biased without any further evidence. He is also one of my Assistant Returning Officers and I have a complete trust in his integrity and ability to undertake a responsible task.

2. I have carefully considered the objection and the grounds on which it was made and I have come to the conclusion that the points raised by Mr. Jackie Yong are valid points. Form 3 is a form which is required to be completed in triplicate in accordance with Regulation 4(2) of the Elections (Conduct of Elections) (Sabah and Sarawak) Regulations 1968. Failure to supply any detail particular including this sentence:— "I wish to be described on the ballot paper as..." is, in my view, a breach of this Regulation. I accordingly find that the nomination paper of Wan Hamid did not materially comply with the requirement of these regulations and I decided that it should be rejected.

(c) T.K. Muip bin Tabib.

(d) ....

Their nominations were objected to on similar grounds to those of Wan Hamid bin Tuanku Surur and the grounds of judgment equally apply in these two nomination papers. The objections were upheld and the nomination papers were rejected."

The substance of petitioner No. 1's evidence was to the effect that he approached the returning officer at about 10.30 a.m. This was after all the nomination papers were displayed on the notice board.

He wanted to withdraw his nomination paper because there was a blank in the nomination paper where the following words appear "I wish to be described on the ballot paper as...". The returning officer refused to return his nomination paper. It was subsequently rejected.

His signature on Exhibit C. 1 is expressed as I. T. Muip.

He said in cross-examination that he wished to be described as "Muip bin Tabib".

The substance of petitioner No. 2's evidence was to the effect that he asked for the return of the nomination paper at 10.30 a.m. This was after the nomination papers were displayed on the notice board.

His signature appears as "S. Hamid". If he had the nomination paper back he would have filled the words "Wan Hamid" against the words "I wish to be described on the ballot paper as".

He denied that he told the returning officer that if a symbol of ship is written without his name he would be satisfied.

In support of his evidence, petitioner No. 2 called Chia Chin Shin (P.W. 4) who was in fact in court listening to the entire proceedings.

In cross-examination this witness was hesitant in his reply when asked whether the returning officer was telling the truth.

His reply (after approximately 9 minutes) was to the effect that petitioner No. 2 did not say so. He added that the returning officer could have misunderstood petitioner No. 2.

Respondent No. 2 (D.W. 2) and Sim Boon Chew (D.W. 1) gave evidence, the latter being the sponsor of parliamentary election for respondent No. 1. Their evidence supported that of the returning officer (P.W.1).

Sim Boon Chew (D.W. 1) said that petitioner No. 2 (Wan Hamid) told the returning officer that the symbol is quite enough without his name. The returning officer and the petitioners spoke in bazaar Malay.

Francis Loke (Respondent No. 2) (D.W. 2) said he understood what Wan Hamid said very well. Petitioner No. 2 said that he was quite happy without his name being written on the paper as long as the symbol was there.

The returning officer Abang Mohammed bin Abang Sarkawi (P.W. 1) gave evidence which was substantially what he had already recorded in Exhibit C. 6.

I now come to the events of the nomination day, *i.e.* 5th April, 1969.

Before I do so, it is necessary to consider the terms, so far as material, of regulations 4, 6, 7 and 9 of the Elections (Conduct of Elections) (Sabah and Sarawak) Regulations, 1968 (hereinafter referred to as "the Nomination Regulations"): —

"Nomination papers

4.(1) ....

(2) Candidates shall be nominated by means of nomination papers submitted in triplicate .... The written consent of the candidate must be endorsed on each nomination paper which shall be as set out in Form 3 in the First Schedule to these Regulations.

....

Proceedings on nomination day

6.(1) The returning officer shall on the day of nomination attend at the place of nomination between the hours of ten o'clock in the forenoon and one-thirty o'clock in the afternoon.

(2) Three copies of every nomination paper must be delivered in person to the returning officer between the hours of ten o'clock in the forenoon and twelve noon by the candidate or by his proposer or seconder....

(3) The returning officer shall forthwith cause a copy of every nomination paper so delivered to be posted in a conspicuous position outside the place of nomination.

(4) The returning officer shall permit the candidates and their proposers and seconders and one other person, if any, appointed by each candidate in writing to be present on the day and at the place of nomination between twelve noon and one-thirty o'clock in the afternoon and there and then to examine the nomination papers of candidates which have been received for that constituency.

Objection to nomination papers

7.(1) Objection may be made to the nomination paper by any person whose name appears in the electoral rolls for the constituency and by any candidate for the constituency on all or any of the following grounds but on no other ground, namely —

....

(b) that the nomination paper does not comply with or was not delivered in accordance with the provisions of these Regulations;

....

(4) The returning officer shall with the least possible delay after one-thirty o'clock in the afternoon on the day of nomination decide on the validity of every objection and inform the candidate concerned or his proposer or seconder named in the nomination paper provided for in paragraph (2) of regulation 4 of these Regulations of his decision and the grounds thereof.

(5) The decision of the returning officer shall be final and conclusive for the purposes of the election in respect of which the proceedings are being held, and shall not be called in question in any court:

Provided that any person aggrieved by the decision of the returning officer may present an election petition in respect thereof on the grounds set out in paragraph (b) of section 32 of the Election Offences Ordinance, 1954, and the provisions of the said Ordinance shall take effect accordingly.

Withdrawal of candidature

9.(1) A candidate may, before twelve noon on the day of nomination, but not afterwards, withdraw his candidature by giving a notice to that effect signed by him to the returning officer.

(2) ....".

The returning officer began to receive the nomination papers in triplicate at 10.00 a.m. He displayed the third copy on the notice board. He received the nomination papers in accordance with the provisions of the above regulations.

Chia Chin Shin (P.W. 4) came to the office and requested withdrawal of the nomination papers in respect of the two petitioners, for the purpose of correcting some mistakes in them. The returning officer's reply was that he could not under the law allow any candidate to withdraw his nomination papers for the purpose of amending any mistake. No provision exists which permitted him as returning officer to allow anyone to have access to nomination papers once they were lodged. To allow them to withdraw the nomination papers before twelve noon to make certain amendments would be to defeat the provisions of regulation 7 of the nomination regulations.

The law provides that objection time would be after the close of twelve noon — 1.30 p.m. Nomination closed at twelve noon sharp.

Objections were first raised by Wan Hamid bin Tuanku Surur (Petitioner No. 2) in respect of nomination papers of Esa bin Haji Ali and Entebang Brain, (with which we are not concerned). (See Appendix "A" — Exhibit C. 6). The returning officer upheld the objections and rejected the nomination papers, and informed the candidate of his decision.

Some time later objections were taken by Jackie Yong in respect of nomination papers of Pangis bin Dohak, and Wan Hamid bin Tuanku Surur for reasons given in Appendix "A".

The next objection was in respect of the nomination paper of Tua Kampong Muip bin Tabib (petitioner No. 1). His objection was similar to that of Wan Hamid. Petitioner No. 1 did not say on the nomination paper how he wished to be described here, merely putting down "—".

Sim Boon Chew (D.W. 1) also raised substantially the same objections in respect of nomination papers of the two petitioners. The returning officer upheld their objections and rejected their papers for non-compliance with the provisions of the law.

It is to be observed that the returning officer's version of what petitioner No. 2 (Wan Hamid) said at the hearing of the objection by the returning officer had been seriously disputed by both petitioner No. 2 and Chia Chin Shin (P.W. 4) who was called in support of Petitioner No. 2's story. There is a sharp conflict of evidence as to the reasons why the words "I wish to be described on the ballot paper as..." were not filled in.

It is worthy of note that no attempt was made to adduce evidence as to the kind of Malay spoken by the petitioners to the returning officer.

While I cannot say that Chia Chin Shin (P.W. 4) was deliberately telling an untruth I do not consider that his version of what transpired is correct. He may have been honestly mistaken.

I am satisfied upon the evidence that D.W. 2 and D.W. 1 have sufficient knowledge of the Malay language to enable them to follow such a conversation as took place between petitioners and the returning officer.

It is significant to note that petitioner No. 2 (Wan Hamid) had himself objected to two candidates, and both objections were upheld by the returning officer under regulation 7(1)(b) of the Nomination Regulations.

In coming to the conclusion I have reached after observing the demeanour of the witnesses, I consider the returning officer's evidence as truthful. I prefer his testimony as more worthy of reliance as to all material matters as to which they are at issue.

I therefore accept the evidence of the returning officer with regard to what had taken place on the morning of the nomination day as true.

Various cases numbering in all sixteen were cited by counsel for petitioners to support the proposition that inaccurate description of places, omission of father's name, and the distinction between improper rejection and improper acceptance of a nomination (as to which I have dealt with in the preliminary issue) were immaterial.

The cases quoted on inaccurate descriptions of a place are *Regina* v. *Munday;*[19] *Batala Sikh Rural Constituency (Case No. 2)*[5] and *Bodh Raj* v. *L. Shiv Dayal.*[20]

Also cited was the case of *Southern Towns Mohammadan Constituency*[21] where it was held that it was the duty of the returning officer to clear doubt regarding identity by summary inquiry.

On the question of inaccurate description of place, this is covered by regulation 28 of the Nomination Regulations which reads as follows: —

"No misnomer or inaccurate description of any person or place named or described in any notice or other document whatsoever prepared or issued under or for the purposes of these Regulations shall in any wise affect the operation of these Regulations as respects that person or place if that person or place is so designated in such notice or document as to be identifiable."

On the question of 'summary inquiry', particular reliance was placed on the case of *Sitapur District East, Babu Jagan Nath Prasad* v. *Raja Maheshwar Dayal Seth,*[22] which was decided with reference to the Indian Rules regarding the Conduct of Elections which are as follows: —

"The Returning Officer shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, *after such summary inquiry,* if any, as he thinks necessary, refuse any nomination on any of the following grounds."

This decision need not concern us. The provision as to summary inquiry has, as far as can be ascertained, no counterpart in our election law.

I am afraid that there is not a great deal of help to be got out of the cases which have been quoted by counsel for petitioners because in none of them was the precise point with which I have to deal raised for decision.

In spite of the arguments addressed to me I can find nothing in our election laws or other statutory provisions which expressly allows the returning officer to return the nomination papers except in the case of a withdrawal (See regulation 9 of the Nomination Regulations).

I would refer to regulation 28 of the Nomination Regulations which provides as follows: —

"No *misnomer* or *inaccurate description* of any person or place named or described in any notice or other document whatsoever prepared or issued under or for the purposes of these Regulations shall in any wise affect the operation of these Regulations as respects that person or place if that person or place is so designated in such notice or document as to be identifiable."

It was suggested in argument that section 3(18) of the Sarawak Interpretation Ordinance (Cap. 1) is relevant. It reads as follows: —

"Whenever forms are prescribed under any written law slight deviations therefrom, not affecting the substance and not calculated to mislead, shall not invalidate them."

The Indian Act, however, provides in section 36(4) as follows: —

"The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character."

In neither case was the question before the court a misnomer or inaccurate description or slight deviations, but in both there was a complete omission.

There are certain references to the jurisdiction in *Parker's* Conduct of Parliamentary Elections (1970).

Parker tells us at page 135 —

"The nomination paper should not therefore be altered or added to after signature (*Harmon* v. *Park*[23]), unless to correct a mere insignificant or clerical error. . . ."

and at page 141 —

"He (the returning officer) is a judge of fact, and the fact in all cases within his jurisdiction is whether the requirements of the law with respect to the filling up, signature, and time of delivery of a nomination paper have, in substance and in common sense, been complied with. In the exercise of this function, the returning officer acts judicially, and he must therefore proceed with the utmost *bona fides* and impartiality; it in so doing no partiality or misconduct can be charged against him, he is not responsible for a *bona fide,* though erroneous, decision upon any point of law which can be raised in regard to any nomination paper (see *Harmon* v. *Park*[24]).

An examination of the nomination paper including the evidence shows that petitioner No. 2 has referred himself as Wan Hamid bin Tuanku Surur, S. Hamid and Wan Hamid.

It was in evidence that petitioner No. 2 wanted to be described as Wan Hamid although his name on the nomination paper is expressed as Tuanku Surur Wan Hamid while his signature is S. Hamid.

In the case of petitioner No. 1 he has referred himself as Muip bin Tabib and I. T. Muip.

Now the question before the court is which of the several names has each of the petitioners elected to insert in Form 7 — Form of Front of Ballot Paper.

I think it is clear that Form 3 and Form 7 when read together indicate that the object was to fill in the

Ballot Paper (Form 7) the name which the candidate wished to be described as set out in Form 3.

What the petitioners have sought to do is to assert that the returning officer possessed the necessary power for which our election laws do not provide.

I am of opinion and I so hold that the returning officer was right in rejecting the nomination papers of petitioner No. 1 as well as petitioner No. 2.

On the evidence so given and facts so found it is my view that the returning officer proceeded with utmost *bona fides* and impartiality.

Before departing from the case two observations fall to be made.

I would quote the following from *Srivastava* on Law of Elections, Volume II at page 267: —

"In this connection the following observations of an Election Tribunal in the case *Hari Das* v. *Hira Singh Pal*[0] — may be usefully reproduced —

'Law reports on election cases, both in India and England are replete with cases, where election petitions have failed on account of their defective drafting. It is a sad commentary on the legal profession that a large number of election petitions should be dismissed, or some paragraphs of the petition be struck off for haphazard drafting. Election law is a special law and a specialized knowledge is required to bear upon the subject....

It is the duty of the lawyer to be thoroughly conversant with the election law, and avoid drafting the petition in careless and casual manner. It is perfectly true that some defects cannot entirely be eliminated even by the most skilful, but, on the other hand, a larger number of them arise from perfectly avoidable slipshodness and want of precision in thought, legal knowledge and expression. Hence scrupulous and meticulous care is needed in drafting election petitions'."

It is suggested and I do not propose to say, one way or the other, whether I agree with the suggestion that there is nothing to prevent petitioners putting in another nomination paper with the correct entries before the closing time for receiving nomination papers.

That really concludes the determination of the matters that I have to decide in both election petitions.

In my view for the reasons given, the preliminary objection must succeed and the petitions fail on the question of merit.

I therefore determine that the respondents were duly elected and I shall so report to the Election Commission.

The petitions are accordingly dismissed with costs.

Petitions dismissed.

CHAN LOO KHEE v. LAI SIEW SAN & ORS.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) January 18, 1971]

[Ipoh — Federal Court Civil Appeal No. 84 of 1970]

Negligence — Motor vehicle parked by side of road at night with tail lights on — Whether driver can reasonably foresee that accident would result — Whether any duty to keep a proper and adequate look-out.

In this consolidated action, three motor cars were involved in an accident near Tanjong Malim where the road was straight and of good width. One of the cars was a Volkswagen driven by a schoolmaster who was returning home after a holiday in Kuala Lumpur. The second car was an Opel proceeding in the opposite direction towards Kuala Lumpur. The third car was a Fiat bound for Kuala Lumpur which the trial judge found as a fact to be stationary on the carriage-way at the time of the accident. The learned trial judge found that the Fiat car was so parked with its side lights on, but held that "in this position and in the circumstances of the accident, it could not and did not constitute such an obstruction to the Opel as to have contributed to the accident." He found the driver of the Opel wholly to blame for the accident and dismissed the claim for contribution by the driver of the Opel against the driver and owner respectively of the Fiat as third parties. On appeal,

Held, dismissing the appeal (Gill and Ali F.JJ., Ong C.J. dissenting): in the circumstances of this case the driver of the Fiat motor car was not guilty of negligence in parking his Fiat car on the road side with its parking lights on, as he could not have reasonably foreseen that his act in doing so would cause the accident, and therefore the learned trial judge was right in holding that the driver of the Opel car was wholly to blame for the accident.

Observations on meaning of negligence.

Cases referred to:-

(1) *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.
(2) *Brown* v. *Thompson* [1968] 1 W.L.R. 1003, 1008.
(3) *The Miraflores and the Abadesa* [1967] 1 A.C. 826, 845.
(4) *The Wagon Mound* [1961] A.C. 388, 426.
(5) *Hughes* v. *Lord Advocate* [1963] A.C. 837, 845.
(6) *Harvey* v. *Road Haulage Executive* [1952] 1 K.B. 120, 122.
(7) *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Exch. 781, 784.
(8) *Fardon* v. *Harcourt-Rivington* (1932) 146 L.T. 391, 392.
(9) *Bourhill* v. *Young* [1942] 2 All E.R. 396, 403.
(10) *Glasgow Corporation* v. *Muir* [1943] A.C. 448.
(11) *Bolton* v. *Stone* [1951] 1 All E.R. 1078, 1081.
(12) *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, 173.
(13) *Berrill* v. *Road Haulage Executive* [1952] 2 Lloyds Rep. 490, 492.
(14) *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, 173.
(15) *Haley* v. *London Electricity Board* [1965] A.C. 778.
(16) *Vancouver General Hospital* v. *McDaniel & Anor.* (1935) 152 L.T. 56, 57.
(17) *Henley* v. *Cameron* (1949) 65 T.L.R. 17, 18.
(18) *Hill-Venning* v. *Beszant* [1950] 2 All E.R. 1151.
(19) *Morris* v. *Luton Corporation* [1946] K.B. 114.
(20) *Davis* v. *Mann* (1842) 10. M. & W. 546, 152 E.R. 588.
(21) *Boy Andrew (Owners)* v. *St. Rognvald (Owners)* [1948] A.C. 140.
(22) *Davies* v. *Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291.
(23) *Grant* v. *Sun Shipping Co. Ltd.* [1948] A.C. 549, 563.
(24) *The Volute* [1922] 1 A.C. 129.
(25) *Swadling* v. *Cooper* [1931] A.C. 1.
(26) *The Bywell Castle* (1879) L.R. 4 P.D. 219.
(27) *Kelly* v. *W.R.N. Contracting Ltd. & Anor. (Burke, third party)* [1968] 1 W.L.R. 921.

FEDERAL COURT.

Lim Kean Chye (*Lim Ewe Hock* and *C. W. M. Abraham* with him) for the appellant.

P. P. Dharmananda for the respondents 1-8.

K. A. Menon for the respondents 9 and 10